Case No. _____

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

_____

IN RE AMERISOURCEBERGEN DRUG CORPORATION, AMERISOURCEBERGEN CORPORATION, CARDINAL HEALTH, MCKESSON CORPORATION, CVS RX SERVICES, INC., CVS INDIANA, L.L.C., CVS TENNESSEE DISTRIBUTION, L.L.C., CVS PHARMACY, INC., WEST VIRGINIA CVS PHARMACY, L.L.C., CAREMARK RX, L.L.C., RITE AID OF MARYLAND, INC., D/B/A RITE AID MID-ATLANTIC CUSTOMER SUPPORT CENTER, HENRY SCHEIN, INC. AND HENRY SCHEIN MEDICAL SYSTEMS, INC., WALGREEN CO. AND WALGREEN EASTERN CO., AND WALMART INC.

Petitioner-Defendants

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FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION
CASE NO. 1:17-MD-2804

PETITION FOR WRIT OF MANDAMUS

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PETITION FOR WRIT OF MANDAMUS

Pursuant to 28 U.S.C. § 1651 and Federal Rules of Appellate Procedure 21, Petitioners AmerisourceBergen Corporation, AmerisourceBergen Drug Corporation, CVS Indiana, L.L.C., CVS Pharmacy Inc., CVS Rx Services, Inc., CVS Tennessee Distribution, LLC, Cardinal Health, Inc., Caremark Rx, L.L.C., Henry Schein Medical Systems, Inc., Henry Schein, Inc., McKesson Corporation, Rite Aid of Maryland, Inc., Walgreen Co., Walgreen Eastern Co., Walmart Inc., and West Virginia CVS Pharmacy, L.L.C. petition for writ of mandamus compelling the U.S. District Court for the Northern District of Ohio, Eastern Division, Polster, J., to recuse himself from all cases in *In re: Nat'l Prescription Opioid Litig.*, MDL-2804.

INTRODUCTION

Petitioners respectfully request a writ requiring the disqualification of Judge Polster in MDL-2804. Judge Polster denied Petitioners' disqualification motion on September 27, 2019. Op. 1 (the "Opinion").[1] The first bellwether trial (involving five of the Petitioners) is scheduled to begin October 21, 2019, with jury selection beginning October 16.[2]

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[1] Per Federal Rule of Appellate Procedure 21(a)(2)(C), Petitioners have included a copy of the Opinion as an attachment to this Brief.

[2] On August 30, 2019, the Ohio Attorney General sought mandamus relief to prevent the trial, arguing that cities/counties lack parens patriae standing to bring the suit.

Petitioners do not make this request lightly. But the extraordinary nature and number of the Judge's actions and comments leave Petitioners no choice. Judge Polster has lost sight of his judicial responsibilities under Article III—neutrality, discretion, and restraint. A writ of mandamus compelling Judge Polster to recuse himself is appropriate for two reasons.

First, Judge Polster has failed to maintain the appearance of impartiality by (1) repeated comments that convey his prejudgment of the merits and his pursuit of a personal mission apart from the performance of his judicial role, and (2) numerous press interviews and public appearances about this litigation. None of this is normal or appropriate for a federal judge.

Second, despite Judge Polster's deep involvement in settlement negotiations, he ruled on September 24, 2019, that he, not the jury, would determine what relief plaintiffs in the first trial should be awarded if they prove their public nuisance claim (they seek $8 billion). To be clear, the problem is not that Judge Polster has applied intense pressure on the parties to settle, but that settled precedent precludes a judge who has been deeply involved in settlement discussions from conducting a bench trial and awarding relief. Moreover, no reasonable person could avoid questioning the Judge's impartiality with respect to awarding abatement relief when he said at the very outset of the litigation that "[m]y objective is to do something meaningful to abate this crisis" including have the defendants pay

"some amount of money to the government agencies for treatment." R.71, PageID #462-63.

Judge Polster's Opinion denying Petitioners' disqualification motion underscores these inescapable concerns. He freely admits he has "had a 'personal mission' from the start of the case" and that this mission involves having defendants pay monies to plaintiffs to alleviate the crisis of opiate addiction. Op. 11. He acknowledges that "[o]rdinarily, the resolution of a social epidemic should be the responsibility of our other two branches of government," but he pleads that "these are not ordinary times." *Id.* Judge Polster disclaims prejudging the cases, suggesting his past statements assigning "responsibility" to the defendants had nothing to do with their legal liability, even as he reasserts—in the very next sentence—that those same defendants are "responsible" for "creating the opioid crisis." Op. 3. And he intones that the defendants "must now take some responsibility for fixing" the crisis, apart from any determination of liability—a statement coupled with his personal invitation to "all entities who have the power to ameliorate" the crisis to "***join me*** in doing so without delay." *Id.*[3] This call to join a personal crusade, however noble it might be coming from a private citizen, is incompatible with the role of an impartial judge.

Judge Polster claims—10 times in his 14-page Opinion—that his personal mission does not translate into bias. That is beside the point, not just because

[3] All emphases are added unless otherwise indicated.

Petitioners do not seek his disqualification for actual bias, but because judges may not use their judicial position to pursue non-judicial personal goals. In any event, Judge Polster's statements and actions clearly create the ***appearance*** of bias. The Opinion itself does so, stating that "the continuing economic burden" on the plaintiff governments "is extreme" and that "the pharmaceutical industry … has not performed the way it should"—two of plaintiffs' central but disputed allegations in the litigation, which he asserts as fact, before any trial. Op. 2-3, 11.

As for his dozen or so public appearances and press interviews, the Opinion does not defend them. The "extraordinary amount of publicity" received by the MDL litigation and the fact that "every type of local and national media has reported daily, if not hourly," Op. 2, was not license for Judge Polster to take a greater role on the public stage, as the Opinion suggests, but was reason to be more circumspect. The judicial canons and 28 U.S.C. § 455(a) do not matter less because a judge presides over a case of national importance.

In all, there is more than ample evidence that a reasonable person would question the Judge's impartiality—as the Ohio Attorney General and legal commentators have done. The Judge abused his discretion by not recusing when presented with the record of conduct and statements that clearly violate § 455(a).

The Opinion does not even address the impropriety of Judge Polster's conducting a bench trial regarding an $8 billion request for equitable relief given

his deep involvement in settlement negotiations and his publicly-expressed views about the costs of the epidemic.

The time for disqualification is now, before any trial and the opening of new discovery tracks. Judicial disqualification serves a purpose beyond protecting the interests of the litigants in a particular case; it preserves public confidence in the integrity of the judicial system. That should be a special imperative in this litigation, which is so much in the public eye.

ISSUE PRESENTED

Should a writ of mandamus issue to require the district court judge to recuse himself pursuant to 28 U.S.C. § 455(a) where he abused his discretion in denying the motion for disqualification because:

1. He made statements in court and in numerous press interviews and public appearances that gave the appearance that he had prejudged disputed facts, including Petitioners' responsibility for the opioid crisis, and that he had personal objectives apart from impartially ensuring the administration of justice; and
2. He intends to act as the factfinder to award abatement relief after being actively involved, personally and through his Special Master, in settlement discussions with defendants.

BRIEF STATEMENT OF FACTS

On December 12, 2017, the JPML created *In re Prescription Opiate Litigation*, MDL-2804, and assigned the matter to Judge Polster to preside over "consolidated pretrial proceedings." R.1, PageID #4. The MDL proceedings are still in an early phase, and the upcoming trial involves just two cases, involving two plaintiff-counties and seven defendants. Activity in the other 2000-plus MDL cases has so far been stayed.

The defendants comprise a portion of the pharmaceutical supply chain: opioid manufacturers that make and market prescription opioids; wholesale distributors that deliver them to pharmacies and providers that order the pills; and pharmacies that dispense opioids pursuant to a doctor's prescription. Petitioners are distributor and pharmacy defendants. The plaintiffs allege that manufacturers deceptively marketed prescription opioids; that distributors supplied too many pills by filling pharmacy orders; and, in some cases, that pharmacies dispensed too many pills by filling doctors' prescriptions. Plaintiffs contend the alleged oversupply of opioid pills caused the opioid crisis and, in turn, plaintiffs' increased public expenditures.

Rather than approach these cases like any other—by supervising discovery and deciding legal issues—Judge Polster declared at the initial MDL hearing that he was not "interested in depositions and discovery and trials" or in "figuring out the answer to interesting legal questions," adding that "[w]e don't need a lot of briefs and we don't need trials. … [N]one of those are going to solve what we've

got." R.71, PageID #467. He announced his personal objective to "do something meaningful to abate this crisis and to do it in 2018." R.71, PageID #462. He expressed "confiden[ce] that we can do something to dramatically reduce the number of opioids that are being disseminated, manufactured, and distributed." R.71, PageID #463. In an order entered before any discovery or merits briefing, he stated that "the vast oversupply of opioid drugs in the United States has caused a plague on its citizens and their local and state governments," referred to that alleged oversupply as a "virus," and ordered the release of ARCOS data as a "step toward defeating the disease." R.233, PageID #1124-25. His Opinion repeats these sentiments.

Judge Polster also has commented extensively on the litigation in press interviews and in public forums. Judges very rarely do interviews, but Judge Polster has given two interviews to The New York Times—allowing one reporter to shadow him for a day—as well as to Bloomberg News, Associated Press, Christian Science Monitor, Law360, and Cleveland Jewish News.[4] He also has participated in panel discussions about the litigation and the opioid crisis, including, among others, panels variously titled "*Defining the Epidemic—Human and Economic Costs*"; "*Addiction and the Opioid Crisis: Revelations of Recovery,*

[4] R.2603-1, PageID #414200-03; R.2302-2, PageID #414228-30; R.2302-3, PageID #414232-40; R.2302-4, PageID #414242-44; R.2305-6, PageID #414257-63; R.2603-7, PageID #414265-67; R.2603-11, PageID #414281-84; R.2603-13, PageID #414291-93.

Community Action and the Legal System"; and "*Addicted: Opioids, Judge, & Jewish Wisdom*."[5] He has talked about the litigation to gatherings or classes at Harvard, Duke, and NYU law schools. He addressed a closed session of state attorneys general, many of whom have filed opioid-related lawsuits against one or more Petitioners in state courts, at a meeting of the National Association of Attorneys General. Altogether he has made public appearances to talk about the litigation at least seven times that Petitioners are aware of.

On August 26, 2019, Judge Polster ruled with respect to the first case set for trial that he has "discretion to craft a remedy that will require Defendants, if they are found liable [for nuisance], to pay the prospective costs that will allow plaintiffs to abate the opioid crisis." R.2519, PageID #408815. Since Petitioners moved for disqualification, Judge Polster ruled definitively on September 24 that he would determine the "abatement" remedy, for which plaintiffs seek $8 billion in the bellwether trial. R.2629, PageID #414990.

Petitioners moved to disqualify Judge Polster on September 14, 2019. R.2603, PageID #414180. He denied the motion on September 26, 2019. Op. 1.

THE STANDARD FOR DISQUALIFICATION

Section 455(a) of the Judicial Code provides:

[5] R.2603-10, PageID #414279; R.2603-9, PageID #414275; R.2603-1, PageID #414214.

> Any justice, judge, or magistrate judge of the United States ***shall*** disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).[6] Judicial disqualification is "evaluated on an objective basis, and so what matters is not the reality of bias or prejudice, but its ***appearance***." *Liteky* v. *United States*, 510 U.S. 540, 548 (1994). The dispositive question under Section 455 is: "Would a reasonable person knowing all the relevant facts question the impartiality of the judge?" *Reed v. Rhodes*, 179 F.3d 453, 467 (6th Cir. 1999).[7]

Mandamus is an appropriate vehicle for relief where a district court should disqualify itself, but refuses. *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc) (joining "the clear consensus view that we can and should consider a petition for mandamus following a district court's denial of a motion to disqualify based on … appearance of partiality")). This Court "ordinarily reviews recusal decisions for abuse of discretion." *Id.* (internal quotation marks omitted).

WHY THE WRIT SHOULD ISSUE

The JPML assigned Judge Polster to preside over consolidated pretrial proceedings, not chair a commission on solving the opioid epidemic. The administration of justice demands "the 'cold neutrality of an impartial judge.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) (*per curiam*).

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[6] *See also* Code of Conduct for U.S. Judges, Canon 3C(1).

[7] *See also In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc) ("Under § 455(a) a recusal is required when a reasonable person would harbor doubts about the judge's impartiality.").

Yet Judge Polster ***admits*** that he has "had a 'personal mission' from the start of the case," and that, even now, apart from assigning legal liability, he holds Petitioners and others "responsible … for having created the opioid crisis," such that they "must now take some responsibility for fixing it." Op. 3, 11. This statement of personal mission exists alongside: (1) Judge Polster's in- and out-of-court statements that his goal is to secure monies (from defendants in the litigation) as quickly as possible to pay for addiction treatment provided by plaintiff-governments; and (2) the prejudgment expressed by Judge Polster when he said—before any discovery or substantive submissions—that defendants' alleged over-supplying of prescription opioids was "wrong," leaving only the question "whose pills." R.156, PageID #830.

What's more, Judge Polster has put himself in the public eye, speaking publicly on numerous occasions about the litigation—occasions on which he has spoken about his personal mission ***and*** commented on the merits of the litigation. In these ways, as explained in Parts I, II and III, he has made statements that would prompt "a reasonable person knowing all the relevant facts [to] question the impartiality of the judge." *Reed*, 179 F.3d at 467.

Judge Polster's significant involvement in settlement discussions independently requires his recusal from the bench trial on abatement relief, as explained in Part IV.

For all these reasons, Judge Polster should have disqualified himself. His refusal to do so was an abuse of discretion. Given that Judge Polster intends to preside over the imminent, first bellwether trial in an MDL that is still in early stages—a bellwether trial that seeks billions of dollars and inevitably will have implications for the other 2000-plus MDL cases as well as hundreds of state cases—his failure to recuse will cause Petitioners irreparable harm.

I. Judge Polster's Statements Show That He Has Prejudged Defendants' Liability for the Opioid Crisis.

"[P]arties are entitled to a decision-maker who comes to the controversy without predisposition …." *Matter of Huntington Commons Assocs.*, 21 F.3d 157, 158 (7th Cir. 1994). Yet, at the initial MDL hearing—before any evidence or argument—Judge Polster announced, "***everyone shares some of the responsibility, and no one has done enough about it***," and called out the defendants—"the manufacturers, the distributors, the pharmacies." R.71, PageID #462. Aware that the allegations against defendants include that they negligently flooded the plaintiff-counties with prescription-opioid pills, the Judge further declared:

> What we've got to do is dramatically reduce ***the number of the pills that are out there*** and make sure that the pills that are out there are being used properly. ***Because we all know that a whole lot of them have gone walking and with devastating results***....

R.71, PageID #463. He subsequently expressed the view that, where large numbers of opioid pills were supplied, liability is a given, with the only question being the identity of the supplier: "[***e***]***veryone knows that was wrong***, it shouldn't

have happened. The question is, ***whose pills.***" R.156, PageID #830. In permitting access to DEA's ARCOS database, he stated as fact that "the ***vast oversupply*** of opioid drugs in the United States has caused a plague on its citizens and their local and State governments," referring to the alleged oversupply as a "virus" and a "disease." R.233, PageID #1124-25.

Judge Polster's Opinion only confirms the appearance that he has prejudged important disputed questions, including causation. He admits stating at the outset that the defendants "are responsible to some degree for having created the opioid crisis" and repeats two prejudgments, stating ***as fact*** that: (1) "the continuing economic burden on government at all levels is extreme;" and (2) based on "[c]urrent levels of overdoses," it is "painfully obvious that our system of 'controls'"—which unmistakably refers, at least in part, to Petitioners' systems—"***has not performed the way it should***," creating a need to "bring about systemic change." Op. 2-3, 11.

These issues go to the heart of the litigation, especially the claims against Petitioners, who are wholesale and pharmacy suppliers of controlled substances. Assertions that the alleged oversupply "was wrong" or "caused a plague" on county governments are not given propositions that "everyone knows"—they are plaintiffs' allegations and issues of fact disputed by Petitioners and their expert witnesses (including former DEA employees who enforced the regulations that guard against oversupply).

II. Judge Polster's Statements Show That He Views the Litigation as a Vehicle for Fulfilling a Personal Mission.

The reasonable questions about Judge Polster's impartiality that arise from his prejudgments are even more acute when considered alongside his admitted personal ambition to help solve the opioid crisis by obtaining monies from defendants for addiction treatment as quickly as possible. That is not the role of a federal judge. "Above all else, the mission of a federal judge is to administer justice without respect to persons, and … faithfully and impartially discharge and perform all the duties incumbent upon" him. *United States* v. *Whitman*, 209 F.3d 619, 625-26 (6th Cir. 2000) (reassignment required on remand because judge announced his goal was to "educate[e] the bar" and "improve the practice of law") (internal quotation marks omitted).

Judge Polster has stated to the parties, the press, and the public that he believes it is his responsibility and personal obligation to "do something meaningful to abate this crisis"—that "ordinary people can do extraordinary things if they step up." R.71, PageID #462; R.2603-6, PageID #414258. He acknowledged early on that achieving this goal was out-of-step with the federal court's constitutional function: "The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it's here." R.71, PageID #462. He told the parties that he intended not only to (1) "get some amount of money to the government agencies" (i.e., plaintiffs), but also to (2) "dramatically reduce the

number of the pills that are out there," and (3) make sure that the pills "go to the right people and no one else." R.71, PageID #462. "So that's what I am interested in doing," he avowed. *Id.*

These personal objectives were his first priority. He stated that performing a judge's customary role would be secondary, if not a waste of time:

> ***People aren't interested in depositions, and discovery, and trials***. ***People aren't interested in figuring out the answer to interesting legal questions*** like preemption and learned intermediary, or unravelling complicated conspiracy theories.
>
> [***I***]***f I've got to do it in a traditional way***, and – I guess I'll have no choice. ***I'll admit failure*** … .
>
> We don't need – ***we don't need a lot of briefs and we don't need trials***. … [***n***]***one of those are going to solve what we've got***.

Id. Article III empowers a district judge to adjudicate cases and controversies by overseeing discovery, conducting trials, and "figuring out the answer to … [the] legal questions" that govern the viability of claims under the law. R.71, PageID #462. Judge Polster strayed far from his judicial role by treating the MDL assignment as a calling to achieve "the resolution of a social epidemic"—a task that "in ordinary times" would be "the responsibility of our other two branches of government," while simultaneously belitstling the "traditional" tools of the judiciary.

His judicial and extrajudicial statements since the first MDL hearing confirm that his commitment to personal objectives at the expense of the judicial function has not changed. When he reluctantly authorized discovery to proceed in April 2018, he imposed an unprecedentedly short schedule for a case of this complexity. R.232, PageID #1090-91. In August 2018, after only three months of discovery, he remained adamant that litigating would frustrate his personal objective to do something "meaningful" right away to ameliorate the crisis:

> I didn't want this litigating track. ***The defendants insisted they wanted to file all these motions***. I said, All right. … [A]ll this discovery and depositions and whatever, and a trial, ***will accomplish zero.***

R.854, PageID #20325. At that time, the Magistrate Judge had not yet issued Reports and Recommendations on the motions to dismiss. Nevertheless, Judge Polster stated, "[O]f course, ***we need to come up with some amount of money*** … some meaningful amount to help treat the people who are addicted so that they don't die." R.854, PageID #20326. Judge Polster has never proposed any source of money that he believes "we need to come up with" other than the defendants.

Some months later, in an off-the-record hearing, the Judge said it was the litigants, not he, who had wanted a litigation track and that he favored focusing on the money that opioid-plagued communities needed now. Returning to his personal mission, Judge Polster said that the defendants should consider their "moral responsibility" for the opioid crisis, creating the unmistakable impression in

any reasonable observer that Judge Polster had already drawn his own conclusions about their culpability.

In May 2019, shortly before the filing of summary judgment and *Daubert* motions, Judge Polster said, "[M]y attention and my time, candidly, is going to be on facilitating the settlement track." R.1643, PageID #46048.[8] In September, in a decision certifying an unprecedented "negotiation class" comprised of all cities and counties in the country, the Judge reiterated his personal objective "to expedite relief to communities [i.e., plaintiffs] so they can better address this devastating national health crisis." R.2616, PageID #414909. More recently, he put himself in the position to decide how much that relief would be, ruling that he would preside over a bench trial to determine the abatement relief plaintiffs will receive, if they prove a nuisance at trial. R.2629, PageID #414990.

Coloring this series of in-court statements are Judge Polster's statements to the press. Speaking to The New York Times reporter who shadowed him, Judge Polster was quoted as saying: "The judicial branch typically doesn't fix social problems, which is why I'm somewhat uncomfortable doing this, [b]ut it seems the most human thing to do." R.2603-3, PageID #414237.[9] The Christian Science Monitor, in an article titled "*An unprecedented effort to stem the opioid crisis –*

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[8] To date, the Court has not heard oral argument on any of the dozens of motions to dismiss, summary judgment motions, or *Daubert* motions.

[9] Judge Polster gave a second interview to the New York Times in January 2019 R.2603-4, PageID #414242.

and the judge behind it," quoted Judge Polster saying about himself: "Ordinary people can do extraordinary things if they step up." R.2603-6, PageID #414258. He told the Cleveland Jewish News that he had urged the parties "at the same time they're fighting over the lawsuit, to see if they can take some steps to turn the trajectory of [addiction] and death down" and "requested that everyone try and work together to come up with some steps that we can take this year, in 2018, to begin to abate the crisis." R.2603-7, PageID #414266. This request arose, he told the paper, from trying "to approach these cases through the lens of" his upbringing and religious training that "one should try to alleviate suffering." R.2603-8, PageID #414271.

To be clear, Petitioners do not seek recusal because Judge Polster created a "settlement track." Questions about his impartiality exist because he declared a personal mission to see that monies were directed from defendants to plaintiffs as quickly as possible, then at every juncture he attempted to force a settlement to achieve that mission, and now has declared himself the factfinder to determine how much money would flow to plaintiffs as abatement relief. Judge Polster's Opinion only reinforces the appearance that he continues to pursue—indeed, gives priority to—non-judicial personal goals. He continues to call on everyone with "power to ameliorate [the opioid crisis]" to join him in "bring[ing] about systemic change" and "improv[ing] the system." Op. 3, 11. This would be a laudable mission statement for a legislator. But mission statements are not the business of a federal

judge, whose only "mission" is impartially to resolve specific legal disputes among the parties before the court, based on the facts presented in court. *See Whitman*, 209 F.3d at 625-26.

Thus, Judge Polster's goal "from the beginning was something other than what it should have been, and indeed, was improper." *United States v. Antar*, 53 F.3d 568, 573-74 (3d Cir. 1995) (*Antar I*); *Antar v. S.E.C.*, 71 F.3d 97 (3d Cir. 1995) (*Antar II*), *both overruled in part on other grounds*, *Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001). In *Antar I* and *II*, six judges of the Third Circuit held that a judge had a duty to recuse when he announced—during sentencing—that his "object in this case ***from day one*** has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others." *Antar II*, 71 F.3d at 102 ("This indicates that the judge's purpose was at odds with his judicially mandated responsibility to provide a fair trial and impartial forum for the litigants before him."). That judge's statement about his day-one goal unavoidably raised questions about his impartiality because, "[a]fter all, the best way to effectuate [his] goal would have been to ensure that the government got as free a road as possible towards a conviction, which then would give the judge the requisite leverage to order a large amount of restitution." *Antar I*, 53 F.3d at 576. His stated goal thus "created the appearance that he had allied himself with the SEC in the civil action." *Antar II*, 71 F.3d at 102.

As "stark" as the judge's language was in *Antar*, however, the Third Circuit described an even starker example: "[W]e consider what the situation would have been if, instead of revealing his goal at the end of trial, the judge made the same statement ***at the beginning of the trial***." 53 F.3d at 576. In that scenario—***precisely*** what happened here—"[t]here would be very little question that such a statement would give rise to a duty to recuse." 53 F.3d at 576. Judge Polster's goal of "do[ing] something meaningful to abate this crisis," R.71, PageID #462, both (1) defined an objective that goes beyond the MDL judge's role of coordinating pretrial proceedings for the hundreds of transferred cases and trying bellwether cases and (2) aligned the court with plaintiffs, who allege nuisance and seek a broad abatement remedy. Similar to *Antar I*, the surest way to accomplish these goals would have been for Judge Polster to impose tremendous discovery costs on defendants, unreasonably accelerate the path to bellwether trials, deny certification of novel and dispositive legal issues to the Ohio Supreme Court and this Court,[10] appoint himself factfinder on the plaintiffs' $8 billion request for relief, and all along the way insistently press the defendants to settle—all of which he did.

Judge Polster's statements are more than sufficient to raise a question about his impartiality. *Antar I*, 53 F.3d at 577 ("a reasonable observer is entitled to take

[10] R.1120, PageID #27582 (denial of motion for leave to file motion for certification); R.1283, PageID #35446 (denial of interlocutory appeal).

the judge at his word" and "we must be careful not to rewrite what the judge has said and render unreasonable the clearest and most obvious reading of the language"). Though it is not necessary to show that reasonable persons have questioned his impartiality, they have. Indeed, the Ohio Attorney General recently criticized Judge Polster's "willingness to brush aside the law to facilitate a settlement." Mandamus Petition at 26, *In re State of Ohio*, No. 19-3827 (6th Cir. Aug. 30, 2019). The media and commentators, too, have expressed doubts about the Judge's impartiality. The Cleveland Scene called it "a pretty amazing thing" that he told the parties that "everyone's to blame" and "any settlement had to go beyond dollars and cents to address real, viable solutions to a problem that is decimating the American population." R.2603-5, PageID #414248. Even more striking, a forthcoming article in the Georgia Law Review titled, "MDL and the Allure of Sidestepping Litigation," questioned Judge Polster's pronouncement of "his moral duty" to "reduce the flow of opioids" into the wrong hands and his "stunning statement" that "'we don't need a lot of briefs and we don't need trials.'"[11] About that last statement, the article comments: "What motions and trials accomplish, the lawyers in his courtroom might have thought, is adjudication of disputes on the merits." *Id.* at 6.

[11] H. Erichson, MDL and the Allure of Sidestepping Litigation, Forthcoming, 53 Ga. L. Rev. at 4-5 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371209.

As *Antar I & II* and *Whitman* instruct, a judge's declaration of a non-judicial, personal, and, therefore, improper goal mandates disqualification.

III. Judge Polster's Out-of-Court Conduct Creates a Reasonable Question About His Impartiality

Judge Polster has given at least seven interviews about the litigation and has participated in seven or more panels and discussions. These activities violate Canon 3A(6), which states that a "judge should not make public comment on the merits of a matter pending or impending in any court." Although a judge may comment on his official duties and court procedures, Judge Polster's statements to The New York Times, Bloomberg News, Associated Press, Law 360, Christian Science Monitor, and other publications went far beyond such textbook information, as did his participation in various panel discussions. And while a judge may make scholarly presentations for purposes of legal education, none of Judge Polster's public statements or appearances were limited to that purpose.

The Opinion barely defends the number of Judge Polster's press interviews and public appearances, and it distinguishes the cases cited by Petitioners on the basis that he has not "intimated [his] view on the merits of any of the claims or defenses" when he has. Op. 11; *see supra* Section I. Regardless, the appearance of partiality can arise apart from discussing the merits. When a judge publicly comments on a case, the appearance of partiality arises not merely from the actual words spoken, but also from the very fact that the judge has elected to speak to the press about the case at all.

In *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), the Tenth Circuit held that § 455(a) required the disqualification of a judge who spoke to the press only once, appearing on "Nightline" to state firmly that he would enforce his injunction barring protesters from blocking access to abortion clinics. "Two messages were conveyed by the judge's appearance on national television in the midst of these events," the Court said. One message was "the words actually spoken." The other "was the judge's ***expressive conduct in deliberately making the choice to appear in such a forum*** at a sensitive time to deliver strong views on matters which were likely to be ongoing before him." *Id.* at 995. This behavior "unmistakenly conveyed an uncommon interest and degree of personal involvement in the subject matter." *Id.*[12]

Likewise, in *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001), the First Circuit held that a judge's letter to the newspaper correcting inaccuracies about the procedural posture of the case, plus a follow-up interview in which the judge called the pending proceeding "more complex" than a previous case, required her disqualification. *Id.* at 167. The First Circuit doubted that the judge had commented on the merits of the case, but observed that "when a judge makes public comments to the press regarding a pending case, he or she invites

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[12] The Opinion distinguishes *Cooley* on the basis that the judge said about the protesters subject to his injunction, "these people are breaking the law." Op. 10-11. But the Judge implied the same when he told Cleveland Jewish News that "any settlement" would include "behavioral change on the part of the Defendants." R.2603-9, PageID #414276-77.

trouble …," particularly in a matter "of significant local concern" where a judge must be "particularly cautious" because the public may consider the very fact of responding may express "an undue degree of interest in the case." *Id*. at 169-71.[13] "[T]he very rarity of such public statements, and the ease with which they may be avoided," the Court said, "make it more likely that a reasonable person will interpret such statements as evidence of bias." *Id*. at 170; *see also Ligon v. City of New York*, 736 F.3d 118 (2d Cir. 2013), *vacated in part on other grounds*, 743 F.3d 362 (2d Cir. 2014) (disqualifying the district judge who gave three interviews, none of which even mentioned the litigation by name, concluding "judges who affiliate themselves with news stories by participating in interviews run the risk that the resulting stories may contribute to the appearance of partiality").[14]

The case for disqualification is even more compelling here. Judge Polster's comments were not limited to one television appearance (*Cooley*) or one letter-to-the-editor with a follow-up interview (*Boston's Children's First*). Judge Polster has repeatedly commented directly on the litigation in multiple interviews and

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[13] The Opinion distinguishes *Boston's Children* on the grounds that the judge supposedly made "explicit statements about the merits of the claims in the litigation." Op. 10-11. In fact the judge was disqualified even though the First Circuit held "it is not at all clear that Judge Gertner was commenting on the merits" and "understood her own comments as entirely ethical explanations of the reasons behind court procedures." 244 F.3d at 168.

[14] The Opinion distinguishes *Ligon* on the basis that the judge urged a party to file a new lawsuit and designate it as related. Op. 10-11. That was one ground for recusal. The other was the three interviews, "[g]iven the heightened and sensitive public scrutiny of these cases." 736 F.3d at 127.

public appearances, and his comments were not limited to explanations of court procedures and enforcement of an injunction (*Cooley*) or the procedural posture of a motion (*Boston's Children First*). They concerned disputed factual issues, his personal goals, and his views regarding acceptable settlements. And they were not made about one case, but about all of the 2000-plus MDL cases—cases that are not just of significant local concern, but of "daily, if not hourly" reporting by national media. Op. 2.

Judge Polster invited precisely the kind of trouble described in the cases by his interviews and appearances. He was asked to comment on a statement by one of the plaintiffs' experts that credited his "overwhelming" settlement pressure with bringing about Purdue's decision to halt marketing to doctors.[15] The fact that the Judge was confronted with this "praise," even apart from his choice to deflect rather than disclaim it, reflected an appearance that his sympathies align with the plaintiffs' objectives. *Id.* Similarly, the article, *Can Judge Dan Polster Get Big Pharma to Pony Up Billions for Its Role in the Opioid Crisis*, quoted his statement in court that "everyone shares some of the responsibility … [t]hat includes the manufacturers, the distributors, the pharmacies," and linked it with the observation that "many believe he will be trying to run down a path few would try" and his

[15] *See* R.2603-1, PageID #414203 (citing *Ep. 210 – What You Don't Know About the Opioid Multidistrict Litigation in Cleveland, Ohio*, Cover 2 Podcast (Oct. 12, 2018), https://cover2.org/ep-210-what-you-dont-knowabout-the-opioid-multidistrict-litigation-in-cleveland-ohio/).

own earlier interview answer that "[t]his is my time to do something significant, I'm not going to take a pass." R.2603-5, PageID #414248, #414250-51.

The *en banc* decision in *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001), addressed two problems that can give rise to an appearance of partiality when judges talk to the press. First, the D.C. Circuit recognized that interviews are conversations, not monologues. Because reporters may furnish information to the judge, the D.C. Circuit asked, "What did the reporters convey to the District Judge during their secret sessions?" *Id*. at 113. The same question may be asked about The New York Times reporter who shadowed Judge Polster for a day. The article says that the reporter solicited the Judge's response to "disparaging comments" made by lawyers in the case that he was "arrogant" and "[u]nrealistically ambitious," R.2603-3, PageID #414237.

Second, the D.C. Circuit expressed concern about "[j]udges who covet publicity, or convey the appearance that they do," and recognized that "[m]embers of the public may reasonably question whether the District Judge's desire for press coverage influenced his judgments," or "whether a publicity-seeking judge might consciously or subconsciously seek the publicity-maximizing outcome." *Id*. at 115. Members of the public may reasonably have the same question here, given: (1) how many interviews the judge has given and how many public appearances he has made, and (2) the nature of his comments, which reflect his personal commitment to ameliorate the larger social problem (*e.g.*, "[t]he judicial branch

typically doesn't fix social problems, …[,] [b]ut it seems the most human thing to do;" and "it's on us to do something about it;" and "[o]rdinary people can do extraordinary things if they step up.").[16]

Judge Polster's interviews and public appearances constitute independent ground for disqualification under 28 U.S.C. § 455(a).

IV. Judge Polster's Significant Involvement in Settlement Discussions Prevents Him from Acting as a Factfinder.

Plaintiffs seek "abatement" as a remedy for their public nuisance claim. Judge Polster held that, because abatement is an equitable remedy, he will decide what abatement relief should be awarded, including how much of the $8 billion requested by plaintiffs in the first trial they will receive if they prevail on their nuisance claim. R.2629, PageID #414990. Apart from any appearance of partiality, Judge Polster's deep involvement in settlement discussions requires him to recuse himself from any bench trial.

When a judge has engaged in settlement discussions, as Judge Polster has, that judge cannot conduct a bench trial. In *Becker v. Tidewater, Inc.*, 405 F.3d 257, 260 (5th Cir. 2005), "the district judge appear[ed] to have mediated the settlement conference," and when the settlement negotiations failed, "was faced

[16] In his appearance at Harvard, Judge Polster commented that he has "become a public figure" and is "not unrecognizable anymore," in contrast with "most judges" and "even Supreme Court Justices" who would "probably be unrecognizable" to the public. *See* "HLS in the Community | The National Opioid Litigation: The Role of Federal Judge as Problem Solver," available at https://www.youtube.com/watch?v=SjNGgswTo0c.

with the possibility of also becoming the trier of fact" in a non-jury trial. "This role," the Fifth Circuit held, "would have been inappropriate given his discrete knowledge of the parties' evaluation of their respective financial positions on settlement" and required recusal. *Id*;[17] *see also In re Royal Manor Management, Inc.*, 525 B.R. 338, 380-81 (6th Cir. 2015) (judge who encouraged settlement, but "did not mediate the dispute or engage in settlement discussions between the parties" was not required to recuse); *Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 503 (6th Cir. 1998) (judge voluntarily recused because he had been involved in settlement discussions and could not conduct bench trial).

Judge Polster "freely admit[s]" that he has "been very active from the outset of this MDL in encouraging all sides to consider settlement." Op. 11. He has met repeatedly with the parties—individually and in industry groupings—as well as with interested third parties. Op. 12. He has invited proposals and made proposals of his own, and he has actively participated in settlement discussions. *Id.* On his behalf, Special Master McGovern has had countless additional meetings and conversations to explore settlement, and has himself discussed details of settlement discussions with the media. *Id.*; R.2603-17, PageID #414320. The Opinion acknowledges the judge's "ceaseless[]" efforts, "countless meetings," and "active participation" in settlement discussions. Op. 4-5, 13.

[17] The *Becker* court affirmed because, unlike here, the defendant failed to raise the issue of disqualification in the trial court. 405 F.3d at 260.

That, in addition, the Judge has spoken publicly about the scope of the problem and stated that his personal goal is to provide monies ***to the plaintiffs*** raises a reasonable question whether Judge Polster can conduct a bench trial and award relief impartially. "When the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced." *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 166 (3rd Cir. 1993); *Chicago Ins. Co. v. Capwill*, 2010 U.S. Dist. LEXIS 68228 (N.D. Ohio July 8, 2010) (granting motion to disqualify where case would be tried to the court).

Contrary to the Opinion, Petitioners did not "argue[] for" the Court to decide abatement. Op. 9. The position of many defendants has been that the $8 billion award plaintiffs seek is legal damages, not equitable abatement. R.2599, PageID #414153. When Judge Polster first expressed an intention to "exercis[e the court's] equitable powers" in order "to craft a remedy that will require defendants … to pay the prospective costs that will allow plaintiffs to abate the opioid crisis," R.2519, PageID #408815, some Petitioners preserved their objections and argued in the alternative that "[i]f the Court adheres to its intention to decide the amount and nature of the so-called 'abatement' remedy, … no evidence relating to Plaintiffs' proposed multi-billion 'abatement plan' should be presented to the jury." R.2599, PageID #414154.

At a minimum, then, Judge Polster must recuse himself from presiding over a bench trial and determining the scope of an abatement remedy. The judge who

determines the remedy, however, should be the same judge who heard the liability evidence. Recusal for one necessitates recusal for both.

V. The Motion to Disqualify Is Timely

Judge Polster has faulted Petitioners for not seeking disqualification earlier. But the grounds for his disqualification snowballed over time, with the Judge's earlier statements reflecting prejudgments and a personal mission culminating in his recent decision to determine himself, in a bench trial, the abatement relief to be awarded the plaintiffs. R.2629, PageID #414990. A certain number of the statements he made that raise a question about his impartiality were made before all Petitioners were parties.

Moreover, as explained in Part IV, Judge Polster must recuse himself from the bench trial concerning equitable relief (and, therefore, as a practical matter, from the trial as a whole) because of his significant involvement in settlement discussions. That requirement is independent of § 455(a) and whatever obligation exists to timely seek recusal when a question arises about a judge's impartiality. There can be no question of delay on this ground. Judge Polster did not rule definitively until September 24, 2019, that there would be a post-jury verdict bench trial at which he would decide the scope of abatement relief, R.2629, PageID #414990, and he only first signaled his intention to proceed in that way in an August 26, 2019 order regarding plaintiffs' abatement experts, R.2519, PageID #408815. Petitioners filed their disqualification motion less than two weeks later.

Regarding the appearance of partiality, any consideration of the motion's timeliness must begin with the fact that 28 U.S.C. § 455(a) "places the duty of disqualification squarely ***upon the presiding judge***." *Bradley v. Milliken*, 426 F. Supp. 929, 931 (E.D. Mich. 1977). That is because "the judge is in the best position to know the circumstances supporting a recusal motion," and so he must "disclose possible grounds for disqualification." *In re: Kensington Int'l Limited*, 368 F.3d 289, 313, 314 (3d Cir. 2004); *United States v. Sibla*, 624 F.2d 864, 869 n.2 (9th Cir. 1980) ("section 455 is self-enforcing on the part of the judge"); *see United States v. York*, 888 F.2d 1050, 1053 (5th Cir. 1989) (section 455(a) may be waived "if the judge fully and fairly apprises the parties of the reasons for the appearance of impropriety"). While Judge Polster did not conceal his many public appearances, neither did he disclose them. Nor has he ever disclosed what he said, including at a closed session with state attorneys general. Petitioners' motion necessarily refers only to what was reported or recorded. None of the moving defendants individually knew about all, or even a majority of, the statements. *In re: Kensington Int'l*, 368 F.2d at 314 ("nothing short of actual knowledge of the facts giving rise to the recusal motions and the Petitions for Mandamus would satisfy the § 455(a) timeliness factor here").

Judge Polster's statements at the initial MDL hearing occurred 20 months ago. Stunning as they were, Petitioners could not imagine at the time that a reviewing court would not make allowance for what could possibly be construed

then as rhetorical flourish or strong encouragement of settlement. His subsequent statements and conduct—capped by his Opinion denying the disqualification motion—make clear in retrospect that his opening remarks were not off-the-cuff flourishes, but deeply-felt convictions and intentions. Had Petitioners rushed to seek disqualification, they surely would have been faulted for jumping the gun and seizing on isolated comments.

The standard for recusal established by § 455(a) reflects the understanding that "[n]othing undermines that foundation [of our adversary system] more than a presiding judge who gives the appearance of partiality." *Bradley*, 426 F. Supp. at 942. Thus, in applying § 455(a), the courts acknowledge that "it is preferable to avoid appearances of impropriety wherever possible." *York*, 888 F.2d at 1055. Timeliness is therefore just "one of the factors which engages a court's discretion in determining whether a judge shall be relieved from its assignment," but it is not a conclusive factor. *In re: Kensington Int'l*, 368 F.2d at 312 (citing *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978). Indeed, § 455 does not contain an explicit timeliness requirement at all, so to the extent it is a consideration, it is only to prevent "wasting valuable court resources by proceeding through a long trial knowing all the time that there are grounds for recusal …." *York*, 888 f.2d at 1053-54; *id*. at 1055 ("a timeliness requirement will proscribe motions that would have invalidated a fully completed trial"); *see Apple v. Jewish Hosp. & Med. Ctr.*, 829

F.2d 326, 334 (2d Cir. 1987) (identifying four factors indicating untimeliness, one of which is "the motion was made after the entry of judgment").

Accordingly, the motion to disqualify was timely.

CONCLUSION

In a recently granted mandamus petition, this Court held that "the original promise of the judicial branch" was that "judges would not usurp power because they can exercise neither force nor will but merely judgment," and that "[w]hen courts act beyond that power … they abuse their discretion." *In re Univ. of Mich.*, 936 F.3d 460, 461-62 (6th Cir. 2019). For the foregoing reasons, the Court should conclude that Judge Polster abused his discretion and grant Petitioners' petition.

Dated: October 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of Fed. R. App. P. 21(d)(1) because it contains 7,800 words, excluding accompanying documents required by Fed. R. App. P. 21(a)(2)(C).

This petition complies with the requirements of Fed. R. App. P. 32(c)(2) and Fed. R. App. P. 32(a) because it has been prepared using Microsoft Word 2016 in Times New Roman, 14-point font.

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2019 the foregoing was filed electronically with the Clerk of Court using the Court's CM/ECF system.

I further certify that on October 1, 2019 a copy of the foregoing was served via electronic mail and United States First Class Mail upon the District Court and Plaintiffs Counsel at the agreed-upon email listserv.

/s/ Enu Mainigi
Enu Mainigi

ATTACHMENT

(R.2676, Opinion and Order, PageID #417350)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	)	**CASE NO. 1:17-MD-2804**
	)	
	)	**JUDGE POLSTER**
	)	
	)	**OPINION AND ORDER**
	)	

The first bellwether trial in this Opioid MDL is scheduled to begin in less than four weeks. Of the 22 named defendants, seven have filed a Motion to Disqualify (docket no. 2603), asking me to recuse myself from all MDL proceedings. For the reasons stated below, the motion is **DENIED**.

* * * * *

The Opioid MDL (MDL No. 2804) was created by the Judicial Panel on Multidistrict Litigation nearly two years ago, in December of 2017. I was honored to accept the Panel's request that I undertake the assignment of MDL transferee Judge. At the outset, the MDL consisted of approximately 100 cases. It has since grown to more than 2,000 cases. The plaintiffs are primarily governmental entities – Cities and Counties from across the country, as well as Indian Tribes.[1] Just as there are thousands of plaintiffs, there are many dozens of defendants. These defendants include manufacturers of prescription opioids, distributors of these opioids, and pharmacies that dispense

[1] Other categories of plaintiff include hospitals, third-party payors, putative classes of individuals, and others.

them.

The governmental-entity plaintiffs assert against the defendants: (1) various legal claims, for which they seek damages as compensation; and (2) equitable public nuisance claims, regarding which they seek abatement and prospective injunctive relief.

During the same time period that the number of federal cases in the Opioid MDL ballooned, the number of cases filed in State courts also rose dramatically – there are now over 400 opioid-related cases pending in various State courts. These include at least 59 lawsuits filed by State Attorneys General, which include similar claims and allegations against the same defendants and seek similar monetary damages and equitable relief.

Many commentators and analysts have called the combined Opioid Litigation the most complex and important group of cases ever filed, and I would not disagree with that characterization. As was being reported even before the Opioid MDL was created, "more Americans died from drug overdoses in 2016 than the number of American lives lost in the entirety of the Vietnam War, which totaled 58,200."[2] The magnitude and significance of the "opioid crisis" and the Opioid Litigation cannot be overstated. Ever since my appointment as transferee Judge, every type of local and national media has reported daily, if not hourly, regarding developments in both the State and federal opioid litigation.

Of course, I was aware from the start about the extraordinary amount of publicity this MDL would receive. This publicity is understandable; the opioid epidemic is historic, one of the greatest tragedies of our time. It cuts across all ages, races, religions, and socio-economic groups. The

[2] *See* https://cbsn.ws/2yA09mq (Oct. 17, 2017) ("Drug overdoses killed more Americans last year than the Vietnam War.").

human toll is staggering, and the continuing economic burden on government at all levels is extreme. Publicly acknowledging this human toll does not suggest I am biased; it shows that I am human. I was very careful in what I said during the first hearing of this MDL in January of 2018, and I have been very careful about what I have said ever since. For example, while moving defendants claim that the statements I made in Court at the outset (quoted at p. 2 of their memorandum) suggest bias, I was very careful to assign *responsibility* (as opposed to potential legal liability) to *everyone* in the case – including not only the MDL defendants *and plaintiffs*, but also the federal government, the medical profession, and even individual opioid drug users. All of these groups are responsible to some degree for having created the opioid crisis, and all who have the power to do so must now take some responsibility for fixing it. As the MDL Judge, the latter includes me, and I said so. Acknowledging the immense scope of the opioid crisis, and calling on all entities who have the power to ameliorate it to join me in doing so without delay, does not reflect any bias or prejudice toward any party to the litigation; and no reasonable observer would so conclude.

Since that time, I have pursued simultaneously and vigorously both a "settlement track" and a "litigation track."[3] I have utilized the assistance of three very experienced and talented Special Masters to assist me in simultaneously managing both tracks. Of course, neither plaintiffs nor defendants can credibly express surprise or dismay that I addressed the prospect of settlement from the very start. Addressing settlement early and often is my standard operating procedure, and I

[3] *See Manual for Complex Litigation Fourth* §13.11 at 168 ("Settlement [and] . . . the pretrial process both can and should operate effectively on parallel tracks.").

believe this is partly why the MDL Panel chose me as transferee Judge.[4] Nor can plaintiffs or defendants credibly complain of my public observations that any settlement will unquestionably require the defendants to pay money to the plaintiffs. This is simply a fact of litigation, not an expression of bias or prejudice or prejudgment against any defendant. Each defendant has a choice to litigate or settle; if it wants to settle, it will have to pay money to plaintiffs. My statements that early settlements are preferable to settlements only after protracted litigation do not carry any negative implication, and the seven moving defendants' drawing of a negative inference is not accurate.

During the course of the last twenty months, I have worked ceaselessly with the parties and also my three Special Masters on both the settlement track and the litigation track. These efforts have begun to bear fruit, as evidenced by the following:

- After having been postponed twice by party request, the first bellwether MDL trial is scheduled to begin in less than a month, on October 21, 2019, with jury selection starting on October 16. At this juncture, there are two governmental-entity plaintiffs and seven defendants, which reflects a substantial whittling-down from the beginning of the case, when there were dozens of plaintiffs and over 20 defendants.[5]

- With the Court's help, the bellwether plaintiffs have reached multi-million dollar settlements

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[4] The *Manual for Complex Litigation* suggests early discussion of settlement *should* be standard operating procedure. *See id.* at 167 ("The judge can encourage the settlement process by asking [about it] at the first pretrial conference . . . ."); *see also id.* §11.214 at 40 ("At *each conference*, the judge should explore the settlement posture of the parties and the techniques, methods, and mechanisms that may help resolve the litigation short of trial.") (emphasis added).

[5] The current plaintiffs are Cuyahoga County and Summit County, Ohio, which encompass the cities of Cleveland and Akron, respectively. Initially there were also dozens of city-plaintiffs within the two counties, but all of these cities have been dismissed or severed. Similarly, the complaints and amended complaints named a total of 22 opioid manufacturers, distributors, and pharmacies, but the majority have either settled or been severed, leaving only seven defendants for trial (or fewer, if there are additional settlements).

with three manufacturing defendants – Endo, Allergan, and Mallinckrodt. The Court continues to assist the parties with ongoing, serious negotiations, which may lead to additional bellwether case settlements before trial.

- In addition to addressing claims made in the bellwether cases, the Court has also assisted and overseen negotiations directed at achieving "global resolution" of ***all*** opioid litigation against the defendants, in both State and federal courts. These efforts led directly to the proposed multi-billion dollar agreed bankruptcy settlement with Purdue and the Sackler family.

The Court's settlement efforts have included countless meetings not only with all of the many parties' outside litigation counsel, but also their highest-ranking decision-makers, including General Counsel, Chief Financial Officers, and Chief Executive Officers, as well as their hired experts (e.g. outside accountants, financial advisors, and bankruptcy attorneys).

At the same time, the Court's litigation efforts (during only the 20 months since this MDL was formed) have so far included: (i) oversight of discovery involving over 450 depositions and over 160 million pages of documents; (ii) rulings on innumerable discovery motions, ranging from the trivial to motions to compel production of documents from the United States Drug Enforcement Agency; (iii) rulings on dozens of dispositive and *Daubert* motions; and (iv) deep preparation for the imminent bellwether trial, up to and including sending out jury questionnaires, review of potential jury instructions, and so on. My Special Masters have also coordinated the voluminous State court litigation with the federal court litigation.

Certain defendants[6] now point to a few discrete settlement and litigation events as a basis for

[6] Of the seven defendants remaining in the bellwether trial, five joined the Motion to Disqualify (AmerisourceBergen, Cardinal, McKesson, Walgreens, and Schein) and two did not (Teva and J&J). Three other MDL defendants who are no longer a part of the bellwether trial also joined the motion (CVS, Rite Aid, and Walmart), while many others did not (e.g. Purdue, Endo, Allergan, Mallinckrodt, Anda, DDM, HBC Giant Eagle, HD Smith, Kroger, Noramco, and Prescription Supply).

my recusal. Specifically, on September 14, 2019 – only 32 days before jury selection in the first MDL bellwether trial – a few of the distributor and pharmacy defendants (but none of the manufacturer defendants) filed this Motion to Disqualify. Their 36-page memorandum alleges that statements I have made in open court and to the media, beginning in January of 2018, create a reasonable question about my impartiality. Most of the statements concern the devastating impact of the opioid crisis, the urgent need to address it, and the benefit to everyone of settlement. The moving defendants allege these statements create the impression that I am biased against them and could not fairly preside over the upcoming October trial. On September 16, 2019, plaintiffs filed a Response (docket no. 2607), and the moving defendants filed a Reply on September 17, 2019 (docket no. 2616).

Plaintiffs' opposition memorandum succinctly refutes the arguments that allegedly support the moving defendants' Motion to Disqualify, and demonstrates that nothing I have said in or out of Court remotely suggests I could not fairly and impartially preside over the October trial; and also that no reasonable observer would question my impartiality. I will not repeat the plaintiffs' points here. It suffices to say that the burden to sustain a motion to disqualify a judge is exceedingly high, and the moving defendants have not met it. There are just a few points that need to be made.

To explain why they did not file their Motion to Disqualify earlier, the moving defendants advance the rationale that it was only recently, after two events occurred, that the need to seek recusal became clear. *See* Reply at 1 (docket no. 2616) (the "decision to file this motion . . . was based on an accumulation of statements made and actions taken by the Court over time, including the Court's recent decisions [1] to certify a novel 'negotiation class' and [2] to take on the role of finder of fact in any remedial phase of the nuisance case"). But neither of these two decisions show

any bias and neither provide "new" grounds for a motion to disqualify.

Regarding my certification of the Negotiation Class, it is true that this procedural mechanism is novel and also true that I issued the order very recently, on September 11, 2019 (docket no. 2591). But this matter has been under active consideration for months: the initial motion for approval was filed on June 14, 2019 (docket no. 1683), and I held a lengthy hearing on the certification motion on August 6, 2019 (tr. available at docket no. 2147). More important, as I have repeatedly made clear, the Negotiation Class mechanism is *entirely optional*. No defendant has to use it, and no defendant suffers any negative impact whatsoever if it decides not to. The Negotiation Class mechanism is simply another, as-yet-untested approach that a defendant *may* use to settle with plaintiffs. I have also repeatedly stated I have no preference for that settlement mechanism over any other that a defendant may choose.

Indeed, the entire motivation for creation of the Negotiation Class mechanism was the insistence of *defendants* that they would not seriously consider resolution unless there was a global mechanism to bind all Cities and Counties that filed lawsuits in the MDL, and also the 20,000 other Cities and Counties that potentially could file lawsuits. Defendants have repeatedly expressed frustration on this front, and the Negotiation Class simply provides a *voluntary* approach that may

help.[7]

I stated clearly at the hearing that the Negotiation Class under consideration need not be the exclusive vehicle for resolution, that nobody would ever be required to use it, and I encouraged alternative settlement concepts. *See, e.g.*, Hrg. Tr. at 55:7-8, 74:8-9 (docket no. 2147). The fact that some Attorneys General do not like the Negotiation Class mechanism because they believe only States, and not Cities and Counties, have authority to settle the opioid lawsuits, does not support the argument that "reasonable observers" now question my impartiality. It is also fair to state that the plaintiffs' work in creating the Negotiation Class mechanism, with my Special Masters' assistance, yielded increased agreement amongst Cities and Counties. I believe that without the cohesiveness that now exists among the 2,000 litigating Cities and Counties, the proposed multi-billion dollar bankruptcy settlement with Purdue and the Sackler family would not have occurred.

The second "recent event" that the moving defendants point to is my supposedly new

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[7] The moving defendants argue that my Order certifying the Negotiation Class displayed bias when I stated certification would "remove 'an obstacle to settlement'" and "expedite relief to communities so they can better address this devastating national health crisis." Reply at 5 (docket no. 2616); *see also* Motion at 5, 12, and 18 (docket no. 2603-1).

When I addressed plaintiffs' motion for class certification, Rule 23(b)(3) required me to ascertain whether class certification was "superior to other available methods for fairly and efficiently adjudicating the controversy." Addressing that prong, the *defendants* explained that this question "can be answered in the affirmative only if certification of this class would actually help *to facilitate the settlement* of a substantial proportion of the pending litigation." Opposition to motion for class certification at 41 (docket no. 1949) (emphasis added). The defendants' own arguments on superiority therefore demanded that I address whether settlement would be advanced through certification of a Negotiation Class. Moreover, as to the value of settlement, the *defendants* stated they were "acutely aware of the benefits that could accrue if a legally supportable mechanism were available *to permit global settlements* in this litigation." *Id.* at 1 (emphasis added).

In other words, defendants made clear to the Court that settlement is important and the Court must decide whether certification of a Negotiation Class furthers that goal; but the moving defendants now insist the Court must disqualify itself for stating that settlement is important and certification of a Negotiation Class furthers that goal.

"decision to take on the role of finder of fact in any remedial phase of the nuisance case." Reply at 1 (docket no. 2616). But it is settled law that, if a defendant is found liable for creating a public nuisance, the decision of whether to impose an abatement remedy (and if so, what that remedy should be) is one that must be decided by the Court, not the jury. The Court stated this clearly weeks ago. *See* Order Denying Defendants' Motion to Exclude Abatement Experts at 3 (docket no. 2519) (August 26, 2019) ("In Ohio, '[w]hen a nuisance is established, the form and extent of the relief designed to abate the nuisance is within the discretion of the court.'") (citing 72 Ohio Jur. 3rd *Nuisances* §49). Moreover, everyone in this case has understood this from the start, as confirmed by recent submissions from the parties. *See* Certain Defendants' Position Paper at 6 n.7 (Sept. 13, 2019) (docket no. 2599) (conceding that "truly equitable relief . . . is for the Court to decide").

Defendants did recently raise the question of whether the Court or the jury would determine whether a public nuisance caused by any defendant *exists* (e.g., liability). After reviewing the parties' submissions and consulting with counsel on a September 16, 2019 telephone conference, I determined the best course of action is to let the jury decide public nuisance *liability*, while the question of abatement remains for the Court. It was *defendants* who argued for this conclusion, not plaintiffs.[8] The Court agreed with defendants because there is substantial overlap in the evidence going to the plaintiffs' nuisance claim and plaintiffs' other claims, and case-law supports allowing

[8] *See* docket no. 2599 at 1-2 (six trial defendants stating they "have a right to trial by jury of Ohio public nuisance claims with respect to the issues of liability and any legal damages . . . [but] the trial should be bifurcated, and any evidence or arguments relating to Plaintiffs' proposed remedies should not be presented to the jury" and instead decided by the Court); docket no. 2602 at 1 (defendant Teva stating it has "a right to trial by jury of Ohio public nuisance claims with respect to issues of liability, but a court should decide Plaintiffs' proposed "equitable abatement" remedy for the public nuisance claims"); *compare* docket no. 2601 at 1-2 (plaintiffs asserting "there is no right to a jury trial on [any aspect of] a public nuisance claim for abatement").

the jury to make the threshold liability determination.[9] None of this remotely supports the moving defendants' claim that I am biased or appear biased against them, or that the grounds for claiming bias arose only recently.

This leaves, as grounds for the moving defendants' Motion to Disqualify, the comments I have made in Court or to the press. I have addressed this above, but add these thoughts. The opioid crisis is a topic of everyday conversation. There are few if any Ohioans who don't have a family member, a friend, a parent of a friend, or a child of a friend who has not been impacted. I have made this observation several times, partly to underscore how important resolution of this litigation is to all of our citizens (not just the parties themselves), and partly to reflect how hard it may be to pick a jury. These comments do not show bias, nor do they provide grounds for a reasonable person to question my impartiality. Nor does my speaking to the press show anything other than a desire to manage the MDL appropriately. *See Civil Litigation Management Manual Second* at 131 (F.J.C. 2010) ("At the outset of a high-visibility case, you will want to take steps to gain the media's cooperation and goodwill."). The moving defendants' citation of cases where other judges made comments to the media are distinguishable because those judges made explicit statements about the

[9] I initially stated orally during a teleconference my intention to allow a jury to determine public nuisance liability, while I would decide abatement if necessary; shortly thereafter, the moving defendants filed their Motion to Disqualify. More recently, I entered an Order reaffirming and explaining my decisions. *See* docket no. 2629. I have structured the October trial so that the jury, and not the Court, will be the trier of the facts. The jury will decide whether any of the defendants is liable under any of the theories advanced by plaintiffs, and if so, what, if any, damages should be awarded. Because the law is clear that, should the jury find a defendant liable for causing a public nuisance, any abatement remedy is a matter of equity for the Court to decide, I will need to hold a separate, post-trial evidentiary proceeding on remedy should the jury find public nuisance liability.

merits of the claims in litigation.[10] I have not done this.

I freely admit I have been very active from the outset of this MDL in encouraging all sides to consider settlement. It goes without saying that if even a small fraction of the 2,000 cases in the MDL requires a months-long trial, the federal judiciary will be overwhelmed and most of the defendants would be forced into bankruptcy, simply because of litigation costs. (Two manufacturer defendants – Insys and Purdue – have filed for bankruptcy this year.) Ordinarily, the resolution of a social epidemic should be the responsibility of our other two branches of government, but these are not ordinary times. I feel it is important for our citizens to know what I am doing and to have confidence that the judicial branch is up to the task – I have said so publicly. The moving defendants complain that I have had a "personal mission" from the start of the case. That is true, but it does not suggest any bias or partiality. Prescription opioids are "controlled substances" under federal law. Current levels of opioid overdoses make it painfully obvious that our system of "controls," which depend jointly upon all levels of government, the pharmaceutical industry, and the medical profession, has not performed the way it should. The result one way or another of a

[10] The cases cited by the moving defendants, where courts held judges should have recused, are materially different on the facts. *See, e.g.*, *Ligon v. City of New York*, 736 F.3d 118, 125-26 (2nd Cir. 2013), *vacated in part*, 743 F.3d 362 (2nd Cir. 2014) ("the judge . . . urged a party to file a new lawsuit to assert [a new] claim, *suggested that such a claim could be viable and would likely entitle the plaintiffs to documents they sought*, and advised the party to designate it as a related case so that the case would be assigned to her") (emphasis added); *United States v. Cooley*, 1 F.3d 985, 990 (10th Cir. 1993) (before presiding over a criminal case against the defendants, the judge stated on national television that "these people are breaking the law"); *In re Boston's Children First*, 244 F.3d 164, 171, 167 (1st Cir. 2001) (in "a highly idiosyncratic case," the judge "arguably suggested that the petitioner's claims for certification and temporary injunctive relief were less than meritorious").

It is simply not true, as the moving defendants assert, that I have intimated my view on the merits of any of the claims or defenses asserted in this litigation. And it is not reasonable to insist that my devoted efforts toward settlement have somehow suggested to a reasonable observer that I harbor some bias or prejudice.

single bellwether trial, or even of 2,000 trials, cannot bring about systemic change. This is why I have tried to engage everyone, including even non-parties to this litigation (such as State Attorneys General and the DEA), to look at ways to improve the system. Defendants have willingly participated in these discussions for many months, at the same time they have vigorously defended themselves against the allegations in the lawsuits; and as a result, there have already been some positive voluntary changes. For example, a motion for injunction against three Pharmacy Benefit Manager ("PBM") defendants was mooted after my settlement discussions led to voluntary adoption of changes to the PBMs' drug formularies, including limitations on the maximum number of opioid pills per prescription and number of opioid pills allowed to minors. I have requested and received the assistance of the State Attorneys General in the settlement track, because each defendant has made clear that a prerequisite to considering settlement is the development of a structure that would permit global resolution of both the State and federal litigation. Toward that end, my Special Masters have spent more than a year working intensively to develop such a structure, and I approved the creation of a Negotiation Class two weeks ago. At the same time, I encouraged defendants to develop any alternative structure if they felt one was better, and my Special Masters have long been working with the parties on those alternatives, as well.

It must be noted that any involvement in settlement by me and my Special Masters has been with the approval of any involved defendant. At no time before filing of the recent Motion to Disqualify has any defendant filed any objection suggesting in any way that my involvement in settlement discussions might compromise my ability to be fair and impartial in conducting a trial. To the contrary, in many instances defendants have reached out and requested my assistance, or the assistance of my Special Masters, in exploring settlement. Through these efforts, several defendants

have reached settlements and others are in active discussion. I do not believe that any of the settlements that have so far been achieved would have happened without my active participation and the work of my Special Masters.

The law is very clear that a party who feels a judge has said or done anything meriting the drastic remedy of disqualification must file a motion promptly. The seven moving defendants have long ago waived any objection to the conduct cited in their motion.[11] The moving defendants waited more than 18 months to complain about anything I have said in Court, or in public, or my involvement in settlement discussions. Tellingly, they have not cited a single instance in all of the myriad rulings I have made leading up to trial that would suggest to anyone bias or partiality. Indeed, the only time I have been reversed in this case is when I sided with the *defendants* and ruled that the DEA's ARCOS data should not be made public. Instead, the moving defendants filed their disqualification motion following months of settlement negotiations with the Court; after the Court issued opinions resolving dozens of *Daubert* and summary judgment motions; and close to the eve of trial. A party cannot sit on a disqualification issue and then deploy it only when it might be strategically beneficial.

And finally, it is appropriate to consider the impact of the remedy sought by the moving defendants, which they make explicit in their Reply: my removal not only from the upcoming October 21 bellwether trial, but from the entire MDL. This would require the Judicial Panel on Multidistrict Litigation to identify another judge who could abandon everything on his/her docket

[11] The grounds for recusal that defendants assert in their motion do not pertain only to the first bellwether trial. Just as defendants make clear they actually seek my recusal from the entire MDL, the question of waiver is applicable to the entire MDL. *See Manual for Complex Litigation Fourth* §13.11 at 168 ("Occasionally, the parties request that the assigned judge participate in settlement discussions, waiving the right to seek recusal.").

to try to learn and understand in less than four weeks what has taken me nearly two years, to come to Cleveland for two months to try this case, and then to undertake continued management of this MDL. Without this replacement judge, the first Opioid MDL bellwether trial will be postponed for some indefinite period of time and the Opioid MDL will quickly degenerate. The focus of opioid litigation will shift more heavily to State courts; the advantages to all parties of central, federal discovery and motion practice will wither; and the likelihood of nationwide, global resolution will wane. Such a result would starkly undermine the main point of my public comments: that the federal judicial branch is up to the task of addressing the opioid crisis, using all the tools it has, including both fairly-negotiated settlements and fairly-fought litigation.

The undersigned is confident that the imminent trial of the first bellwether case, along with the parties' ongoing settlement negotiations – addressing not only the bellwether trial, but also global resolution – will continue to bear fruit. And the undersigned is confident that no reasonable person can legitimately question my impartiality.

Accordingly, the moving defendants' Motion to Disqualify is **DENIED**.

/s/ Dan Aaron Polster
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

Dated: September 26, 2019